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Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

NO. 44 ORIGINAL

* * *

STATE OF TEXAS,

Plaintiff

v.

JOHN N. MITCHELL, ATTORNEY GENERAL OF THE UNITED STATES,

Defendant

* * *

BRIEF ON MOTION FOR LEAVE TO FILE COMPLAINT

* * *

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BRIEF ON MOTION FOR LEAVE TO FILE COMPLAINT

* * *

STATEMENT OF THE CASE

The State of Texas, as Plaintiff, seeks to invoke the original jurisdiction of the Supreme Court of the United States under Article III, Section 2 of the Constitution of the United States, and Section 1251(b)(3) of Title 28, United States Code, for the purpose of having this Court declare that Title III of Public Law 91-285, known as the Voting Rights Act Amendments of 1970, (hereinafter referred to as the Act) is unconstitutional and beyond the power of Congress and enjoining John N. Mitchell, Attorney General of the United States, from taking action against the Plaintiff or its agents and officers to enforce these provisions of the Act.

Article VI, Sections 1 and 2, Constitution of Texas, (Vernon's) and Articles 5.01 and 5.02, Texas Election

Code (Vernon's), provide, as one of the qualifications for voting in the State of Texas, that a person shall have attained the age of twenty-one years. This requirement applies to all elections: federal, state and local.

Title III of the Act provides that no citizen of the United States, otherwise qualified to vote in any state, shall be denied the right to vote in any election if they are eighteen years of age or older. The Defendant, John N. Mitchell, Attorney General of the United States, is authorized and directed to take action against Plaintiff, State of Texas, and its officers and agents to compel compliance with Title III of the Act.

In enacting Title III of the Act, Congress has exceeded the powers, either express or implied, reposed in it under the Constitution of the United States, and has usurped the power of the states to determine the qualifications of voters as provided in Article I, Section 2; Article II, Section 1; the Seventeenth Amendment; and the Tenth Amendment of the Constitution of the United States.

Plaintiff has no other competent forum in which it may protect and preserve its Constitution and statutes from the unconstitutional enactment of Congress and the imminent and threatened enforcement of such Act by the Defendant.

I. THE COMPLAINT PRESENTS A JUSTICIABLE CONTROVERSY WITHIN THE ORIGINAL JURISDICTION OF THE COURT.

Article III, Section 2 of the Constitution of the United States provides in part as follows:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution,

the Laws of the United States, and Treaties made, or which shall be made, under their authority; . . . to Controversies to which the United States shall be a Party;—to Controveries between two or more States;—between a State and Citizens of another State; . . .

In all Cases affecting Ambassadors, other Public Ministers and Consuls, and those in which a State shall be Party, the Supreme Court shall have original Jurisdiction. . . .

Section 1251 of Title 28, United States Code, provides in part:

§1251. Original Jurisdiction

. . .

(b) The Supreme Court shall have original but not exclusive jurisdiction of:

. . .

(3) All actions or proceedings by a State against the citizens of another State or against aliens.

The Plaintiff, State of Texas, is a state of the United States and the Defendant, John N. Mitchell, Attorney General of the United States, is a citizen of the State of New York. The question whether the Congress, in enacting Title III of the Act, has exceeded its constitutional powers and thereby usurped powers reposed in the states, presents conflicting claims of governmental powers with regard to the same subject matter and constitutes a controversy over whether the states or the Congress has authority under the Constitution of the United States to act in the area in question. Therefore, the action set forth in the Complaint presents both the parties and a controversy appropriate for the original jurisdiction of this Court. *South Car-*

olina v. Katzenbach, 383 U.S. 301 (1966); *United States v. California,* 332 U.S. 19 (1945); See *Georgia v. Pennsylvania R. Co.,* 324 U.S. 439 (1945).

II. IT IS IMPERATIVE THAT THE SUPREME COURT ASSERT ITS JURISDICTION.

This is not a case where the Plaintiff state is suing on behalf of private or individual interests rather than as a sovereign, as in *New Hampshire v. Louisiana,* 108 U.S. 76 (1882) and *Massachusetts v. Missouri,* 308 U.S. 1 (1939). Nor is it a case in which the state seeks to sue as representative of its citizens, as in *Massachusetts v. Mellon,* 262 U.S. 447 (1923). The Plaintiff here asserts rights secured to it as a sovereign state of the Union under the provisions of Article I, Section 2; Article II, Section 1; the Seventeenth Amendment; and the Tenth Amendment of the Constitution of the United States, and protests the abridgment of those rights by the Congress through Title III of the Act.

The issue then posed is clearly a substantial one. The decisions of this Court have long held that each state has a wide scope of authority for the imposition of standards and conditions upon the right to vote. The right to vote is a privilege to be exercised as the state may direct, upon such terms as may seem proper to the state, provided there is no discrimination between individuals or classes in violation of the Constitution of the United States. As long as qualifications and conditions regarding voting are reasonable and nondiscriminatory, they are permissible. *Pope v. Williams,* 193 U.S. 621 (1904); *Lassiter v. Northampton County Bd. of Elections,* 360 U.S. 45 (1959); *McDonald v. Board of Election Commissioners of Chicago,* 394 U.S. 802 (1969); *Carrington v. Rash,* 380 U.S. 89 (1965).

Article I, Section 2, of the Constitution and the Seventeenth Amendment, respectively, provide for the election of members of the House of Representatives and Senate. Each provides that the "Electors in each state shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." Likewise Article II, Section 1 of the Constitution provides that the electors for President and Vice President shall be appointed in such manner as the legislature of each state may direct. Thus, while it may be said that the Constitution of the United States establishes and guarantees a right of suffrage with respect to these offices, it expressly adopts as the qualifications for exercising that right, those that may be established by the states. *Ex parte Yarbrough,* 110 U.S. 651 (1884); *United States v. Classic,* 313 U.S. 299 (1940); *Drueding v. Devlin,* 234 F.Supp. 721 (D.C. Md. 1964) aff'd. 380 U.S. 125 (1965); *Gray v. Sanders,* 372 U.S. 368 (1963).

Undoubtedly the right of the states to prescribe qualifications for voting includes the right to provide a limitation upon that right based upon age. This Court has recognized age as being one of the qualifications which the states may fix with regard to voting.

> We do not suggest that any standard which a State desires to adopt may be required of voters. But there is wide scope for exercise of its jurisdiction. *Residence requirements, age, previous criminal record* (Davis v. Beason, 133 U.S. 333, 345-347) are obvious examples indicating factors which a State may take into consideration in determining the qualifications of voters. (Emphasis added.) *Lassiter v. Northampton County Bd. of Elections,* 360 U.S. 45, 51 (1959).

See also *Kramer v. Union Free School District,* 395 U.S. 621, 625-627 (1969). The right of the states in this respect is also explicitly recognized in Section 2 of the Fourteenth Amendment. That section provides:

> Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to *any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States,* or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State. (Emphasis added.)

If it were not recognized that the states had the power to establish the age necessary for qualification as a voter, there would be no necessity for prescribing a penalty for denying the right to vote to persons who are twenty-one years of age. Even so, there is no absolute prohibition against a state establishing a voting age above twenty-one years, as long as it is willing to suffer the accompanying reduction in representation in the House of Representatives.

The power of Congress under Section 5 of the Fourteenth Amendment "to enforce, by appropriate legislation, the provisions of this article" goes no further, insofar as establishment of a voting age is concerned,

than to authorize legislation to enforce the reduction in representation of those states that establish a voting age above twenty-one years. It does not authorize Congress to impose upon the states its own criteria for a maximum voting age and prescribe its own penalty for states that provide otherwise. Nor does any other provision of the Constitution of the United States give Congress such authority.

The substantiality of the constitutional question posed by this case was clearly recognized in the congressional debates that led to the adoption of Title III of the Act. The supporters of Title III, no less than its opponents, recognized that the constitutionality of a federal statute permitting persons 18 and over to vote was a debatable issue that would have to be resolved by this Court. Senator Bayh, for example, said that "* * * we must all recognize that this is a gray area. A reasonable question can be raised." 116 Cong. Rec. S3509 (daily ed. March 11, 1970). Speaker McCormick told the House:

> I realize that there are some honest differences on the constitutional question. But on that question I urge that any doubts be resolved in favor of constitutionality, because the Supreme Court is going to pass upon the question.

116 Cong. Rec. H5675 (daily ed. June 17, 1970).

Section 303(a)(2) of the Act, granting jurisdiction to three-judge district courts, is no barrier to the exercise by this Court of jurisdiction in this case. It does not even purport to give those courts exclusive jurisdiction. Even if it did, it would be ineffective. Section 14(b) of the Voting Rights Act of 1965, 42 U.S.C. § 1973*l*(b), was a deliberate attempt to channel all

litigation about that statute to the District Court for the District of Columbia, yet this did not bar this Court from exercising original jurisdiction in *South Carolina v. Katzenbach,* 383 U.S. 301 (1966). As the Solicitor General correctly said in that case, § 14(b) was "not intended to deprive this Court of jurisdiction of appropriate original actions challenging the Act's constitutionality, in view of the constitutional basis of this Court's original jurisdiction." Memorandum for Defendant at 2 n. 1, *South Carolina v. Katzenbach,* 383 U.S. 301 (1966). There is clear evidence in the legislative history that Congress contemplated that the present statute would be tested by an original action here. See the remarks of Rep. McCulloch, 116 Cong. Rec. H5643 (daily ed. June 17, 1970), and of Rep. Bingham, quoting a letter from Professor Paul Freund suggesting such a course. Id. at H5674.

Although the jurisdiction of this Court of actions by a state against a citizen of another state is concurrent with that of the district courts, 28 U.S.C. § 1251(b)(3), and the Court therefore has discretion whether to entertain the suit, this is the kind of case that is especially appropriate for exercise of original jurisdiction. As the United States said in a similar situation:

> This is the happily rare, and indisputably momentous, situation of direct confrontation between the State and federal governments. It is, we submit, precisely for the resolution of such serious disputes that this Court's original jurisdiction * * * is most appropriately invoked.

Brief in Support of Motions for Leave to File Original Complaints at 15-16, *United States v. Alabama,* 382 U.S. 897 (1965). There are no obstacles here to the

exercise of this Court's jurisdiction. The complaint that we ask the Court's leave to file presents only questions of law. No factual issues are involved that might prove burdensome to the Court. No trial will be required and the Attorney General is the only party called upon to respond. The issue that is dispositive of this litigation is the constitutionality of Title III of the 1970 Act, a question that must reach this Court in due course and that can appropriately be resolved here in the first instance.

III. CONSIDERATION OF THIS CASE SHOULD BE EXPEDITED

Section 305 of the Act provides that the provisions of Title III shall take effect with respect to any primary or election held on or after January 1, 1971. It is imperative that the validity of Title III be resolved prior to that date in order to avoid what Representative Celler described as "calamity and chaos in our electoral process." 116 Cong. Rec. H5642 (daily ed. June 17, 1970). See also id. at H5643 (Rep. Railsback), 5643 (Rep. McCulloch), 5673 (Rep. Robison), and 116 Cong. Rec. S3491 (daily ed. March 11, 1970) (Sen. Cook).

To that end Plaintiff urges that this Court grant leave to file the Complaint as soon as the Court's processes permit and that, if leave is granted, it fix dates for filing of briefs on the merits and oral arguments that will permit prompt disposition of the case.

CONCLUSION

The question presented in this case is of national concern and affects all of the states. It is imperative that this Court take jurisdiction and grant Plaintiff's

Motions for Leave to File Complaint and for Expedited Consideration in order that Plaintiff's rights may be preserved and protected.

Respectfully submitted,

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PROOF OF SERVICE

I Crawford C. Martin, Attorney General of Texas, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the ____ day of ----------, 1970, I served the foregoing Brief on Motion for Leave to File Complaint upon the Defendant by depositing a copy in the United States mail, postage prepaid, and addressed to Honorable John N. Mitchell, Attorney General of the United States, Department of Justice, Tenth and Constitution Avenue, Washington, D. C. 20530.

CRAWFORD C. MARTIN